IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs January 13, 2009

STATE OF TENNESSEE v. KELLY RAY JONES

Appeal from the Circuit Court for Bedford County
No. 16305 Lee Russell, Judge

No. M2008-00031-CCA-R3-CD - Filed July 7, 2009

Appellant pled guilty to a charge of incest involving the sexual molestation of his fourteen-year-old niece on June 5, 2005. Under the plea bargain the length and manner of service of the sentence was left up to the trial judge. Following a sentencing hearing, Appellant was sentenced to four years and six months incarceration with a release eligibility after service of thirty percent of the sentence. In this appeal, Appellant maintains his sentence is too lengthy for the crime he committed and that he should have received some form of alternative sentence. We hold that because the trial court found the presence of enhancement factors in violation of *Blakely v. Washington*, 542 U.S. 296 (2004) and *State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007). Appellant's sentence must be modified to three years. As to the denial of alternative sentencing, the judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed, Sentence Modified and Remanded.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Michael J. Collins, Assistant Public Defender, Shelbyville, Tennessee, for the Appellant, Kelly Ray Jones.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth T. Ryan, Assistant Attorney General; Charles Crawford, District Attorney General, and Michael D. Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The record in this case reveals that on June 5, 2005, the then thirty-four-year-old Appellant sexually molested his fourteen-year-old niece while she was visiting her grandmother with whom Appellant resided. The victim did not report the incident for almost a year and a half until her mother confronted her as to why she no longer visited her grandmother's house. At this point the victim told her mother what her uncle had done to her. The victim's mother confronted Appellant about the incident, and he responded that "the drugs made [him] do it."

On June 18, 2007, the Bedford County Grand Jury indicted Appellant on charges of statutory rape, incest, and sexual battery by a authority figure. A plea agreement was reached between the State and Appellant wherein Appellant agreed to plead guilty to a single charge of incest. The decision as to the length and manner of service of the sentence was left solely to the trial judge. On September 11, 2007, Appellant entered a plea of guilty in accordance with the agreement.

A sentencing hearing was held on December 6, 2007. At the sentencing hearing, the victim's mother testified that Appellant admitted to her that he had sexually abused the victim but blamed the incident on a drug problem. The victim's mother testified as to the devastating emotional and psychological effects the incident has had on both her and her daughter. Both the victim's mother and her *maternal* grandmother testified that essentially the incident had ripped the family apart with the *paternal* grandmother, who is also Appellant's mother, siding with the Appellant in the matter.

Appellant presented the testimony of his own mother who stated that she has made sure Appellant regularly attends sex offender treatment. She stated that if she cannot take Appellant to the treatment sessions she would make sure someone else would. Appellant's mother assured the court that if granted an alternative sentence to incarceration, Appellant would live with her, and she would allow no minors in the house while Appellant was present.

Following the sentence hearing, the trial court denied Appellant's request for probation or another form of alternative sentence. Appellant was sentenced to a term of incarceration of four years and six months as a standard Class C felony offender thus requiring Appellant to serve thirty percent of his sentence before eligibility for parole.

Length of Sentence

In his first issue, Appellant maintains that his sentence is too long given his crime and that the trial judge improperly applied or gave too much weight to the enhancement factors found by the trial judge in this case. As noted earlier Appellant was sentenced as a standard offender convicted of a Class C felony. Given his status, Appellant faced a sentencing range of three to six years of incarceration. T.C.A. § 40-35-112(a)(3).

In determining whether to enhance Appellant's sentence, the trial court found the presence of two applicable enhancement factors. First, the court found that Appellant committed this crime to gratify his desire for pleasure and excitement. Second, the court found that as the victim's uncle, Appellant abused a position of private trust in the facilitation of the crime. *See* T.C.A. § 40-35-114(7), (14).

Appellant did not raise at the sentencing hearing or on appeal any claim that the judge's findings of the above-described enhancement factors violated his rights under the Sixth Amendment pursuant to *Blakely v. Washington*, 542 U.S. 286 (2004). However, without reciting the long line of jurisprudence beginning with *Blakely* and ending in this State with *State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007) it now appears to be settled law that under the Sixth Amendment's provision for a right to a jury trial only a jury may make the factual findings necessary to lengthen a sentence beyond the sentence actually authorized by the verdict of guilt. *Id*. at 740.[1] The only exceptions to this requirement are enhancing a sentence based on a record of prior convictions or if the defendant admits to the enhancement factors. *Cunningham v. California*, 549 U.S. 270, 275, 127 S. Ct. 856, 860 (2007). It also appears to be settled that failure to preserve this issue at the trial level will result in a defendant receiving relief, if at all, through plain error review. *Gomez*, 239 S.W.3d at 736-737.

As noted, Appellant did not raise this issue either at trial or on appeal. Thus, if he is to obtain relief it must be on the basis of plain error. In *Gomez,* our supreme court found that the defendants in that case were entitled to plain error review where their enhanced sentences were the product of a violation of the *Blakely*/*Gomez* holdings, and review via plain error was necessary to do substantial justice. *Id*. We elect to do the same in the instant case. The minimum sentence Appellant could receive in this case was three years. His sentence was enhanced solely by findings of the trial judge made in violation of *Blakely* and *Gomez*. In order to do substantial justice, Appellant's sentence must be reduced to the minimum of three years.

Denial of Alternative Sentencing

In his second issue presented for review, Appellant maintains he should have received a sentence involving probation or some other alternative to incarceration.

At the time Appellant committed the offense in this case Tennessee Code Annotated § 40-35-102(5) provided as follows:

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[1] In response to *Blakely*, the Tennessee Legislature amended T.C.A. § 40-35-210 so that Class A felonies now have a presumptive sentence beginning at the minimum of the sentencing range. *Compare* T.C.A. § 40-35-210(c) (2003) *with* T.C.A. § 40-35-210(c) (2006). This amendment became effective on June 7, 2005. The legislature also provided that this amendment would apply to defendants who committed a criminal offense on or after June 7, 2005. 2005 Tenn. Pub. Act ch. 353, § 18. In addition, if a defendant committed a criminal offense on or after July 1, 1982 and was sentenced after June 7, 2005, such defendant can elect to be sentenced under these provisions by executing a waiver of their *ex post facto* protections. *Id*. In this case Appellant did not execute such a waiver and his offense was committed two days prior to the effective date of the new act.

> In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration . . . .

A defendant who does not fall within this class of offenders "and who is an especially mitigated offender or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing in the absence of evidence to the contrary." *Id.* § 40-35-102(6). Furthermore, unless sufficient evidence rebuts the presumption,"[t]he trial court must presume that a defendant sentenced to eight years or less and not an offender for whom incarceration would result in successful rehabilitation . . . ." *State v. Byrd*, 861 S.W.2d 377, 379-80 (Tenn. Crim. App. 1993); *see also* T.C.A. § 40-35-303(a). In this case, Appellant was convicted of incest, a Class C felony as a Range I Standard Offender. He is thus presumed a favorable candidate for alternative sentencing in the absence of evidence to the contrary.

All offenders who meet the criteria are not entitled to relief; instead, sentencing issues must be determined by the facts and circumstances of each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987) (citing *State v. Moss*, 727 S.W.2d 229, 235 (Tenn. 1986)). Even if a defendant is presumed to be a favorable candidate for alternative sentencing under Tennessee Code Annotated § 40-35-102(6), the statutory presumption of an alternative sentence may be overcome if

> (A) confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
> (B) confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to procide an effective deterrence to others likely to commit similar offenses; or
> (C) measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant . . . .

T.C.A. § 40-35-103(1)(A)-(C). In choosing among possible sentencing alternatives, the trial court should also consider Tennessee Code Annotated § 40-35-103(5), which states, in pertinent part, "The potential or lack of potential for the rehabilitation or treatment of a defendant should be considered in determining the sentence alternative or length of a term to be imposed." *Id.* § 40-35-103(5); *State v. Dowdy*, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). The trial court may consider a defendant's untruthfulness and lack of candor as they relate to the potential for rehabilitation. See *State v. Nunley*, 22 S.W.3d 282, 289 (Tenn. Crim. App. 1999); *see also State v. Bunch*, 646 S.W.2d 158, 160-61 (Tenn. 1983); *State v. Zeolia*, 928 S.W.2d 457, 463 (Tenn. Crim. App. 1996); *State v. Williamson*, 919 S.W.2d 69, 84 (Tenn. Crim. App. 1995); *State v. Dowdy*, 894 S.W.2d at 305-06.

In this case, the trial court was especially concerned over Appellant's lack of candor when confronted with his crime. He first admitted that he has sexually molested his niece, and later, when confronted by authorities denied he every did anything to her. Moreover, his failure to take responsibility for his actions in blaming them on his drug problem reflect poorly on his potential for rehabilitation. The record amply supports the denial of alternative sentencing.

Conclusion

In accordance with this opinion, Appellant's sentence is modified to three years of incarceration, and the case is remanded for entry of a corrected judgment. In all other respects, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE